LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
JAN 10 1956
HAROLD B. WILEY, Clerk

No. 110

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	3
Summary of argument	9
Argument	15
Petitioner was properly adjudicated guilty of contempt for communicating with members of a sitting grand jury, without first notifying the court or receiving its permission	15
A. Petitioner's conduct had a tendency to interfere with and harass the grand jury and constituted "misbehavior"	16
B. Petitioner cannot avoid liability on the ground that he did not intend "conscious wrong", since his actions were knowing and willful	26
C. Since petitioner was acting on behalf of an indicted client for whom he was counsel of record, his "misbehavior" was that of an "officer of the court" engaged in an "official transaction" within the meaning of 18 U. S. C. 401 (2)	31
Conclusion	43

CITATIONS

Cases:

Alexander, In re, 193 Fed. 749	33
Bain, Ex parte, 121 U. S. 1	16
Barsky v. *United States*, 167 F. 2d 241, certiorari denied, 334 U. S. 843	12, 30
Bartos v. *United States District Court for the District of Nebraska*, 19 F. 2d 722	30

Cases—Continued

	Page
Blair v. *United States*, 250 U. S. 273	16
Booth v. *Fletcher*, 101 F. 2d 676, certiorari denied, 307 U. S. 628	33
Bowles v. *United States*, 50 F. 2d 848, certiorari denied, 284 U. S. 648	33
Bradley, Ex parte, 7 Wall. 364	32
Brooks v. *Laws*, 208 F. 2d 18	32
Camarota v. *United States*, 111 F. 2d 243	35
Clark v. *United States*, 289 U. S. 1	13, 35
Clawson v. *United States*, 114 U. S. 477	17
Cobbledick v. *United States*, 309 U. S. 323	16
Ellis v. *United States*, 206 U. S. 246	29
Emspak v. *United States*, 203 F. 2d 54	7, 11, 23, 24
Fields v. *United States*, 164 F. 2d 97, certiorari denied, 332 U. S. 851	12, 30
Garland, Ex parte, 4 Wall. 333	13, 32
Gompers v. *Bucks Stove & Range Co.*, 221 U. S. 418	28
Heard v. *Pierce*, 8 Cush. 338	35
Hertz v. *United States*, 18 F. 2d 52	33
Hudgings, Ex parte, 249 U. S. 378	28
Kelly v. *United States*, 250 Fed. 947, certiorari denied *sub nom. Galen* v. *United States*, 248 U. S. 585	12, 28
Michael, In re, 326 U. S. 224	17, 39
Nye v. *United States*, 313 U. S. 33	21, 38
Paschal, In re, 10 Wall. 483	14, 36–38
Rakes v. *United States*, 169 F. 2d 739, certiorari denied, 335 U. S. 826	10–11, 21
Remmer v. *United States*, 347 U. S. 227	10, 20
Robinson, Ex parte, 19 Wall. 505	32
Savin, Petitioner, 131 U. S. 267	13, 35
Schmidt v. *United States*, 115 F. 2d 394	31, 39
Schmidt v. *United States*, 124 F. 2d 177	39
Sinclair v. *United States*, 279 U. S. 749	10, 16, 21, 22
Spilker v. *Hankin*, 188 F. 2d 35	33
Tanner v. *United States*, 62 F. 2d 601, certiorari denied, 289 U. S. 746	32
Toledo Newspaper Co. v. *United States*, 247 U. S. 402	38

Cases—Continued

	Page
Townsend v. *United States*, 95 F. 2d 352, certiorari denied, 303 U. S. 664	12, 49
United States v. *Anonymous*, 21 Fed. 761	14, 38
United States v. *Dachis*, 36 F. 2d 601	35
United States v. *Hill*, 26 Fed. Cas. No. 15,364	17
United States v. *Morgan*, 313 U. S. 409	19
United States v. *Smyth*, 104 F. Supp. 283	19, 35
United States v. *Weinberg* (D. D. C., Crim. No. 829–52)	7, 11, 23, 25, 26
Wall, In re, 13 Fed. 814, affirmed, 107 U. S. 265	33
Wartman v. *Wartman*, 29 Fed. Cas. No. 17,210	29

Constitution and Statutes:

United States Constitution, Amendment V	16
Act of March 2, 1831, 4 Stat. 487, Section 1	36
Judiciary Act of 1789, 1 Stat. 73, 83, Section 17	36
18 U. S. C. 401	3, 36
18 U. S. C. 401 (1)	14, 39
18 U. S. C. 401 (2)	3, 11, 14, 36, 38, 39, 42
18 U. S. C. 1001	3
18 U. S. C. 1503	17

Miscellaneous:

7 Cong. Deb. 560	36
8 Wigmore, *Evidence* (3rd ed.):	
Sec. 2360	18
Sec. 2361	18

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 110

HAROLD I. CAMMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 27–39), together with a dissenting opinion (R. 39–41), is reported at 223 F. 2d 322. The opinion of the District Court (R. 25–26) is reported in 122 F. Supp. 388.

JURISDICTION

The judgment of the Court of Appeals was entered May 5, 1955 (R. 42). The petition for a writ of certiorari was filed on May 31, 1955, and was granted on October 10, 1955 (R. 42). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Petitioner was counsel of record for a client who had been indicted for filing a false non-communist affidavit under the Taft-Hartley Act. Thirteen members of the grand jury which had returned the indictment were federal employees. Petitioner, without notifying the court or seeking its permission, directed a letter and a searching questionnaire to the federal employee jurors, although the grand jury was still sitting and, to petitioner's knowledge, was actively continuing its investigation of possible similar violations. The questionnaire related to the effect on the jurors of the government's loyalty program and was for possible use in connection with a motion to dismiss the indictment.

The questions presented are:

1. Whether petitioner's conduct in communicating with members of a sitting grand jury, without first notifying the court or receiving its permission, constituted "misbehavior" within the meaning of 18 U. S. C. 401 (2).

2. Whether petitioner can avoid liability for contempt of court for knowing and willful improper conduct, on the ground that he did not intend "conscious wrong".

3. Whether petitioner, in communicating with the grand jurors on behalf of an indicted client, was an "officer of the court" engaged in an "official transaction" within the meaning of 18 U. S. C. 401 (2).

STATUTE INVOLVED

18 U. S. C. 401 provides in pertinent part:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> * * * * *
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> * * * * *

STATEMENT

On June 15, 1954, petitioner was adjudged guilty of contempt of court by the United States District Court for the District of Columbia for misbehavior in an official transaction as an officer of the court, in violation of 18 U. S. C. 401 (2) (R. 24–25). For this contempt he was sentenced to pay a fine of one hundred dollars (R. 25, 26). On appeal, the conviction was affirmed (R. 27–39, 42), with one judge dissenting (R. 39–41).

1. *The facts* are not in dispute and may be summarized as follows:

On August 28, 1953, the May 1953 grand jury for the District of Columbia indicted one Ben Gold for filing a false non-communist affidavit in violation of 18 U. S. C. 1001 (R. 1, 7). On August 31, 1953, petitioner, a member of the New York Bar, entered an appearance *pro hac vice* on behalf of Gold (R. 1, 7, 8). Petitioner was also attorney of record for Vera Taft, secretary to

Ben Gold, and Pietro Lucchi, an associate of Ben Gold, both of whom had been served, prior to September 22, 1953, with subpoenas duces tecum by the same grand jury (R. 1, 7).

On September 22, 1953, petitioner, in his capacity as attorney for Ben Gold (R. 3), knowing that the May 1953 grand jury had not been discharged and had subpoenaed his clients Taft and Lucchi (R. 2, 7), sent to its thirteen federal employee members letters requesting them to answer and return an enclosed questionnaire (R. 2, 3–6, 7, 8, 11). Each letter stated that "in the interest of the fair administration of criminal justice" the return of the questionnaire was sought "to learn the effect of the loyalty program on jurors from the Federal Government" (R. 3, 7). The letter also stated that it was the duty of the juror "as a citizen to help enlighten the court on an issue which affects the liberty of a citizen on trial in a criminal case" (R. 4, 7).

The questionnaire asked each juror eighteen questions of the tenor of the following three (R. 4–5):

> Do you think that it is wise or safe for a government employee to express views on a controversial question different from the position of the Government?
>
> * * * * *
>
> On the whole do you think that it was advisable, in the past six years, in view of the loyalty program, for government employees to take certain precautions, such

as: (a) avoiding an acquaintance; (b) giving up a friendship; (c) resigning from an organization; (d) declining to join or make a contribution to an organization; (e) keeping his views on controversial questions to himself and close friends; (f) declining to help a government employee in a loyalty proceedings, although he knows of nothing against him; (g) avoiding books, magazines and music that might be left-wing in nature or authorship; or (h) advising another fellow employee to do any of the foregoing? Please indicate whether any or all of these would be wise precautions, if so, why?

* * * * *

Do you think that * * * a vote [not to indict a publicized communist] might affect [a government employee's] employment status, in any way, such as possible promotions, assignments, or selection for layoff in the current reductions in force? If so, how?

The jurors were likewise asked whether they thought that a government employee "might get into trouble" for defense of a fellow employee accused of disloyalty, or for failure to drop accused acquaintances, or for reading controversial literature (R. 4–5). The questionnaire also sought to discover whether the government employee was involved in a loyalty proceeding and asked whether the juror thought that a government employee might get into difficulty in a

future loyalty proceeding by reason of a vote to acquit or not to indict a person publicized as a communist (R. 5–6). Petitioner has conceded (R. 7) that he had sent these letters and questionnaires to the grand jurors with knowledge that the grand jury was continuing its investigation of possible similar violations and "without the permission, consent, authorization, or knowledge" of the court (R. 2, 7).

On the same day that petitioner dispatched the letters and questionnaires, he appeared before the District Court to argue motions to quash and vacate the subpoenas issued to his clients Taft and Lucchi, and succeeded in having their appearances in response to the subpoenas deferred (R. 1–2, 7).

On September 24, 1953, the letters and questionnaires were ordered impounded when they were brought to the attention of District Judge Pine by members of the grand jury (R. 2, 18–19). On October 2, 1953, petitioner submitted a statement as to the circumstances under which the letters and questionnaires had been sent, and disclaimed any intention of influencing the grand jury (R. 18–22).

2. *The contempt proceedings.*—On May 10, 1954, after Gold's trial had been completed, petitioner was directed to show cause why he should not be adjudged guilty of contempt for sending the letters and questionnaires to the federal employee members of the grand jury without the

permission or knowledge of the District Court (R. 6–7). The order to show cause was issued on an application made by the United States Attorney (R. 1–6), who had been appointed and directed by the court to investigate the matter (R. 6). Petitioner filed a reply which (a) admitted all the factual allegations set forth in the application (R. 7), (b) denied that these admitted facts constituted misbehavior or contempt, and (c) further alleged that his purpose in sending the questionnaires had been to discover whether there was a basis for challenging for bias the government employee grand jurors; that decisions in prior cases had indicated that, to support such a challenge, more was needed than a mere showing of government employment; and that when he sent the letter and questionnaire he was relying upon the record of what had been done in *United States* v. *Weinberg* (D. D. C., Crim. No. 829–52) and upon a portion of the argument in the government's Court of Appeals brief in *Emspak* v. *United States*, 203 F. 2d 54 (C. A. D. C.) (R. 7–23).

The matter was heard without a jury before Chief Judge Laws, who found petitioner guilty of contempt (R. 24–26), and stated (R. 26):

> There is a decided difference between questioning jurors after they have concluded their services and questioning jurors when they are actively hearing or considering a case. To harass them by

> challenging and lengthy questions while they are deliberating or about to consider cases is intolerable. * * * Jurors will not serve competently if so harassed.

With respect to the argument that the court had allowed only thirty days for motions challenging the grand jury that had indicted Gold, the court pointed out that, had there been a suggestion of a need to investigate bias and a showing of good faith, the court "unquestionably would have postponed the time for filing motions until all indictments were filed and opportunity to ascertain the status of jurors had been afforded" (R. 25–26). Noting that it had "never occurred to [him that] a lawyer would not know the evil of such practices" (R. 25), Chief Judge Laws, however, added (R. 26):

> While the Court finds there is no question as to the impropriety of what respondent has done, it is not without doubt, on the record before the Court, as to whether respondent's acts were committed in conscious wrong.

For this reason, the court imposed merely a fine of one hundred dollars (R. 25, 26).

On appeal, the judgment was affirmed (R. 27–39, 42). Judge Fahy dissented on the ground that petitioner's conduct, while assumed to be misbehavior by an officer of the court, was not "in an official transaction as an officer of the court". He stated that he did not think that

18 U. S. C. 401 (2) gave courts "the power by summary proceedings to police such professional behavior of a member of the bar" (R. 40).

SUMMARY OF ARGUMENT

Petitioner was properly adjudicated guilty of contempt for communicating with members of a still active grand jury, without first notifying the court or receiving its permission. The letter and questionnaire which petitioner, attorney of record for a client whom the grand jury had recently indicted, sent to the jurors was designed to probe their motives in indicting his client as regards possible personal bias toward reputed communists. Because this contempt prosecution is concerned with the impact of petitioner's conduct upon the grand jury system and is directed towards protecting from harassment the grand jury as an arm of the court, there is no occasion to reach the larger issue which petitioner has sought to inject into this case—whether an indictment can be challenged on the ground of personal bias of the grand jurors.

A. Petitioner's conduct constituted misbehavior. Without the knowledge or authorization of the court to which the grand jury was attached, petitioner sent to the federal employee jurors a searching questionnaire composed of challenging and lengthy questions, together with a letter which stated that it was the juror's "duty as a citizen to help enlighten the court" (R. 4) by preparing

and returning answers to the questionnaire. This action had a tendency to interfere with and harass the grand jury, which was still sitting and was, to petitioner's knowledge, actively investigating other possible offenses involving suspected communists.

Since the grand jury is an essential instrumentality of federal courts in the trial of criminal cases, its members, like the members of the judiciary, must be free in their deliberations from outside probing which would unduly add to the onus of their task. This case, therefore, can be decided, as it was in both lower courts, on the simple basis that an attorney can be properly held to know that he should obtain permission from the court before he can properly contact active grand jurors.

In view of the cases which have considered the inviolability of jurors from outside interference, it is not unreasonable to hold an attorney to knowledge that he should not approach them without first obtaining the court's permission. In *Remmer* v. *United States*, 347 U. S. 227, 229, this Court observed, with regard to a petit jury, that "[a] juror must feel free to exercise his functions without the F. B. I. or anyone else looking over his shoulder". In *Sinclair* v. *United States*, 279 U. S. 749, the court upheld defendant's conviction for contempt for conduct which involved jury shadowing. Searching examinations of jurors following a trial was condemned in *Rakes* v.

United States, 169 F. 2d 739 (C. A. 4), certiorari denied, 335 U. S. 826.

Petitioner cannot justify his unauthorized approach to members of an active grand jury by reliance on the uncensured conduct of defense counsel in somewhat different circumstances in *United States* v. *Weinberg*, Criminal No. 829–52 (D. D. C.), and on a sentence taken from context in the government brief in *Emspak* v. *United States*, 203 F. 2d 54 (C. A. D. C.), which did not suggest that court permission was unnecessary.

The facts of this case show that petitioner could not have been unaware of the impact of his questionnaire upon the grand jury. He knew, as was evidenced by his appearance in court to quash subpoenas, that the grand jury was continuing its investigation of communist affiliations of labor union officials. He knew his questionnaire probed for personal bias of grand jurors toward alleged communists. He had ample time to ask the court's permission to mail the questionnaires, had he so desired. Petitioner's argument that the time limit on challenging the grand jurors forced him to proceed without court approval is specious since additional time would surely have been granted had petitioner asked for it in good faith. Moreover, there was nothing to prevent his notifying the court as soon as he undertook his project.

B. The element of intent requisite for contempt under 18 U. S. C. 401 (2) was proved by the gov-

ernment beyond a reasonable doubt. The proof showed that petitioner acted knowingly and willfully.

Petitioner's argument that he may not be found guilty of contempt in view of the trial court's expressed doubt that he acted "in conscious wrong", is not supported by the decisions on the point. In *Kelly* v. *United States*, 250 Fed. 947 (C. A. 9), certiorari denied *sub nom. Galen* v. *United States*, 248 U. S. 585, in which an attorney was charged with contempt for conversing with petit jurors with a view to influencing them, the court, citing cases, stated that it was not necessary in contempt to prove a wrongful motive but that it sufficed to show that defendant acted knowingly and willfully. Similarly, in contempt of Congress cases, the courts do not require proof of a specific intent or a showing of malice. *Townsend* v. *United States*, 95 F. 2d 352 (C. A. D. C.), certiorari denied, 303 U. S. 664; *Barsky* v. *United States*, 167 F. 2d 241 (C. A. D. C.), certiorari denied, 334 U. S. 843, and *Fields* v. *United States*, 164 F. 2d 97 (C. A. D. C.), certiorari denied, 332 U. S. 851.

The true significance of the trial court's remark about petitioner's lack of conscious wrong, as gathered from the context in which it was used, shows that the court was considering malice or the lack thereof in assessing the penalty, not in determining guilt. Petitioner's reliance on the *bona fides* of his conduct serves only to negate any

influence of malice which may be inferred from his acts; it goes to mitigation of the sentence and not to establishing innocence.

C. Petitioner was acting as an "officer of the court" engaged "in an official transaction" when he transmitted his letter and the enclosed questionnaire to the federal employee members of the grand jury. As an attorney duly admitted to practice before the courts of New York State, and before the United States District Court for the District of Columbia, *pro hac vice*, he was an officer of the court. *Ex Parte Garland*, 4 Wall. 333. The grand jury, to which petitioner addressed his letters and questionnaires, was an arm of the court and part of the federal judicial machinery. *Savin, Petitioner*, 131 U. S. 267; *Clark* v. *United States*, 289 U. S. 1.

The letters and questionnaires were prepared by petitioner as an officer of the court and directed to the grand jury which was an arm of the court concerning a case then pending before the court. The letter not only referred to "U. S. v. Gold, U. S. District Court for the District of Columbia, Criminal No. 1344–53", but affirmatively recited that petitioner, as author, was writing in his official capacity as "counsel for the defendant" to the grand jurors in their official capacity. In addition, petitioner cloaked his conduct with a further vestige of official authority by writing of the juror's "duty as a citizen to help enlighten the court."

Though no case has been discovered which squarely passes on the meaning of the words "in an official transaction" in circumstances identical to those here present, the application of the phrase in other cases clearly demonstrates it is broad enough to cover this case. In *In re Paschal*, 10 Wall. 483, this Court pointed out that it was proper for courts to punish by contempt attorneys who misused or withheld funds received by them for their clients pursuant to a judgment of a court. Courts, by virtue of their contempt power, have authority to compel attorneys to behave themselves with propriety in such matters as pertain to the business of the court in all its ramifications. *United States* v. *Anonymous*, 21 Fed. 761 (C. C. W. D. Tenn.).

Since this contempt prosecution rests upon a charge of misbehavior of an officer of the court in an official transaction under subsection (2) of 18 U. S. C. 401, there is no need to be concerned with cases arising under subsection (1), which deals with "misbehavior of any person in [the] presence [of the court] or so near thereto as to obstruct the administration of justice".

This contempt proceeding involves vindication of the integrity of an active grand jury and protecting it from interference and harassment by attorneys who approach its members without court approval. To view this case, as did the dissenting judge below, as a method of policing the legal profession is to misconceive the thrust of the prosecution.

ARGUMENT

PETITIONER WAS PROPERLY ADJUDICATED GUILTY OF CONTEMPT FOR COMMUNICATING WITH MEMBERS OF A SITTING GRAND JURY, WITHOUT FIRST NOTIFYING THE COURT OR RECEIVING ITS PERMISSION

The central fact on which the finding of contempt rests is that petitioner, a lawyer, approached members of a still active grand jury as to matters which could have a bearing on their action as grand jurors without disclosure to or consent of the court. Both the District Court and the Court of Appeals held simply that petitioner, by sending without permission a written interrogatory to canvass the government employee members of the active grand jury which had indicted his client as to their personal bias toward reputed communists, had misbehaved in an official transaction in violation of 18 U. S. C. 401 (2).

Neither court below allowed itself to be drawn into a consideration of the larger issue which petitioner sought to inject into the case—whether a grand jury can be challenged for bias, and if so, under what circumstances. Since the thrust of this prosecution is directed toward the protection of the grand jury as an arm of the court in its traditional and constitutionally protected functions, there is no need to consider at this time, as did the dissenting judge below (R. 40), the use of the contempt power of the federal courts to police the legal profession. The sole issue here, as recognized in the opinion of the

Court of Appeals, is narrowly limited to whether or not the conduct of petitioner in the circumstances of this case constitutes contempt.

A. PETITIONER'S CONDUCT HAD A TENDENCY TO INTERFERE WITH AND HARASS THE GRAND JURY AND CONSTITUTED "MISBEHAVIOR"

The misbehavior for which petitioner was cited and found guilty of contempt consists solely in his unauthorized transmittal of a written questionnaire to some members of a duly empanelled and still active grand jury. The gravity of his act must be measured by examining its impact upon the proper functioning of the grand jury as safeguarded by the Fifth Amendment, which makes that institution a vital part of the federal judicial structure. See *Cobbledick* v. *United States*, 309 U. S. 323, 327; *Blair* v. *United States*, 250 U. S. 273, 282; *Ex parte Bain*, 121 U. S. 1. Because the grand jury is an arm of the court, it is entirely appropriate that the court should protect its integrity and vindicate its rights by use of the contempt power given in 18 U. S. C. 401.

The charge of misbehavior is grounded on petitioner's interference with and harassment of the grand jurors in their overall functioning. It does not rest upon an attempt to influence the grand jurors in relation to a particular case. This Court held in *Sinclair* v. *United States*, 279 U. S. 749, 762, that it was not essential to contempt

arising out of misbehavior in relation to a juror to show that the juror was in fact influenced. It was pointed out that such a requirement would "destroy the power of courts adequately to protect themselves—to enforce their right of self-preservation".[1] It is the free functioning of the grand jury as such, without being subjected to any undue harassment, that this prosecution was intended to protect.

The grand jury is an essential instrumentality of the federal trial court in criminal cases.[2] From its early beginnings to modern practice it provides a means whereby the representative opinion of the community is brought into and

---

[1] An attempt to influence the jury with respect to a particular case would be a felony under 18 U. S. C. 1503. Whether, in that event, an individual would also be subject to contempt proceeding (cf. *In re Michael*, 326 U. S. 224) is not an issue here, since there is no such charge.

[2] In *Clawson* v. *United States*, 114 U. S. 477, at 487-488, Mr. Justice Blatchford quoted from the opinion of Chief Justice Marshall in *United States* v. *Hill*, 26 Fed. Cas. No. 15,364, at p. 317 (C. C. D. Va.), in which he said: "It has been justly observed, that no act of Congress directs grand juries, or defines their powers. By what authority, then, are they summoned, and whence do they derive their powers? The answer is, that the laws of the United States have erected courts which are invested with criminal jurisdiction. This jurisdiction they are bound to exercise, and it can only be exercised through the instrumentality of grand juries. They are, therefore, given by a necessary and indispensable implication. But how far is this implication necessary and indispensable? The answer is obvious. Its necessity is co-extensive with that jurisdiction to which it is essential".

made part of each serious criminal case. It not only serves to protect the citizens from oppressive prosecutions by the government but also affords a means whereby individuals can air their charges and secure an investigation of wrongdoing. While grand juries of ancient times were selected because of the knowledge of their members of the situation into which they were to inquire, the modern grand jury rarely knows the facts until evidence is produced. Its members are now counselled by the court to act without malice or hatred and free from fear, favor, affection, reward or hope of reward.

Professor Wigmore, in his treatise on *Evidence*, after describing briefly in Section 2360 (Vol. 8, 3rd Ed.) the basic reasons for preserving the mantle of secrecy which protects the grand jury, set forth the privileges of grand jurors in Section 2361, as follows:

> The necessity for securing to the grand jurors an absolute freedom of deliberation and decision, immune from apprehensions of injury from the persons charged by them, demands a guarantee that by no legal process will the disclosure of their votes and their expressions of opinion in the jury room be compelled.

This "absolute freedom of deliberation and decision" deemed so important to the proper functioning of a grand jury would be severely impaired if grand jurors were to be subjected as a

matter of course, and without supervision, to inquiry as to personal bias by counsel for each person they indicted. To compel grand jurors to submit to such inquisitions would add greatly to the onus of their task and make many apprehensive of undertaking this important civic duty. Cf. *United States v. Morgan*, 313 U. S. 409, 421–422, where this Court held that administrators should not be subject to probing as to the mental processes by which they reached their decisions. See also *United States* v. *Smyth*, 104 F. Supp. 283, 301 (N. D. Calif.), where the court said:

> An inquisition into the private lives and concerns of grand jurors and their private conduct is an ill method in which to repay an arduous public service. These men and women have been dragged from their ordinary concerns and required by compulsory process to spend months at the public business which did not concern them except as it concerned all other citizens. Such service should not be rewarded by abuse.

As stated at the outset, both courts below found it unnecessary to decide, and we find it unnecessary to treat here, the question of whether a grand juror can ever properly be challenged for bias or whether, if such challenge can be made, it would justify the type of questions which were asked here. This case can properly be decided, as it was below, on the simple basis that, considering the well-established rules against unauthorized

contacts with jurors, an attorney can properly be held to knowledge that he should obtain permission from the court before questioning members of an active grand jury as to their state of mind with respect to issues which bear on the matters before them. In this way, assuming *arguendo* that inquiry would under some circumstances be justified, a court can protect the grand jury from needless harassment, can make certain that inquiry is allowed only in a proper case, and assure that the inquiry is not, as this one most certainly was, unduly sweeping. Such a rule imposes hardship neither on attorneys nor defendants and yet protects the grand jury from oppressive and unnecessary probing into their lives and thoughts.

There is nothing unreasonable in holding an attorney to knowledge that grand jurors, particularly members of an active grand jury, should not be approached without permission. The importance of the freedom of jurors generally from unauthorized contacts has been stressed by this Court and others in numerous cases.

Although *Remmer* v. *United States*, 347 U. S. 227, was concerned with the propriety of an alleged F. B. I. investigation of a petit juror, the statement of this court is equally applicable to situations involving grand jurors. The Court, at page 229 of the opinion, stated:

> The sending of an F. B. I. agent in the midst of a trial to investigate a juror

> as to his conduct is bound to impress the juror and is very apt to do so unduly. A juror must feel free to exercise his functions without the F. B. I. or anyone else looking over his shoulder. The integrity of jury proceedings must not be jeopardized by unauthorized invasions.

In *Sinclair* v. *United States*, 279 U. S. 749, the defendants employed a detective agency to shadow the members of the petit jury and to report daily on their surveillance. In upholding a conviction for contempt, this Court said, 279 U. S. at 765:

> If those fit for juries understand that they may be freely subjected to treatment like that here disclosed, they will either shun the burdens of the service or perform it with disquiet and disgust. Trial by capable juries, in important cases, probably would become an impossibility.

The observations of the court in *Rakes* v. *United States*, 169 F. 2d 739, 745–746 (C. A. 4), certiorari denied, 335 U. S. 826, although directed to the interrogation of petit jurors after the verdict, are also applicable to the questioning of grand jurors after an indictment is returned. The court said:

> The same rule requires that jurors are not to be harassed in any manner because of a

---

[1] *Nye* v. *United States*, 313 U. S. 33, holding that the word "near" in the contempt statute imports a geographic proximity, casts doubt on the validity of the actual holding in the *Sinclair* case, but it does not lessen the force of the Court's statement with respect to the privacy of jurors.

> verdict they have rendered. If jurors are conscious that they will be subjected to interrogation or searching hostile inquiry as to what occurred in the jury room and why, they are almost inescapably influenced to some extent by that anticipated annoyance. The courts will not permit that potential influence to invade the jury room. He who makes studied inquiries of jurors as to what occurred there acts at his peril, lest he be held as acting in obstruction of the administration of justice. Much of such conversation and inquiry may be idle curiosity, and harmless, but *a searching or pointed examination of jurors in behalf of a party to a trial is to be emphatically condemned.* It is incumbent upon the courts to protect jurors from it. [Emphasis added.][4]

Considering that a sitting grand jury is known to be protected by a "mantle of secrecy" as great as that surrounding a petit jury, petitioner, as attorney of record in this case, can justly be held to the minimum knowledge that he should not have approached active jurors without permission.

Petitioner seeks to justify his behavior in attempting to interrogate the grand jurors through the questionnaire by showing that defense counsel

---

[4] To the argument that the government, by investigating jurors on other occasions in the past, had condoned the practice, this Court, in *Sinclair v. United States*, 279 U. S. 749, 765–766, tersely remarked that "violations of law by a give no license for wrongful conduct by others".

in *United States* v. *Weinberg*, Criminal No. 829-52 (D. D. C.), had canvassed a grand jury as to personal bias by use of a questionnaire without reprimand from the court, and also by relying on a statement in the government's brief in the Court of Appeals for the District of Columbia Circuit in *Emspak* v. *United States*, 203 F. 2d 54. Neither of these occurrences authorized petitioner to mail his letters.

Since the *Weinberg* case ended in acquittal, the presiding judge did not write an opinion or express himself formally on the propriety of mailing questionnaires to grand jurors. The court, after hearing arguments on defense counsel's pretrial motion for leave to examine the grand jury in open court on the question of bias, had denied the motion and observed:

> There is nothing to prevent counsel, if he sees fit, contacting those 15 members and inquiring only of *one subject*, whether or not they had any personal bias toward this man, Joseph W. Weinberg; and on that account, did they return the indictment. [Emphasis added.]

In the first place, this remark apparently constituted permission to make a limited inquiry; and for that reason the *Weinberg* case differs from this one. However, the remark can hardly be construed as authorizing the extensive and sweeping questionnaire covering many subjects (and significantly failing to ask the one question the

court authorized) which Weinberg's counsel sent to the grand jurors. The failure of the court to reprimand this transgression of its authorization to make inquiry on the single subject of "personal bias toward * * * Weinberg", cannot be deemed justification for petitioner's patterning of his questionnaire after that sent to the Weinberg grand jury.

Nor can a passing sentence in the government's brief in the Court of Appeals in *Emspak* v. *United States, supra,* be taken as authority for interrogating grand jurors without receiving prior permission from the court. The brief, directed to defendant's motion to examine the grand jurors in court, said in opposition:

> * * * yet, there is not the slightest indication in the long motion and offer of proof that an attempt has been made to interview a single one of the persons.

No suggestion was made that this should have been done without prior authorization. In addition, nothing in the opinion of the court indicated that this expression entered into its decision or was even considered.

Moreover, under the facts of this case, petitioner could not have been unaware that the questions he was asking did bear upon the issues which the grand jury was then considering. As noted in the Statement (*supra*, pp. 3–4, 6), on the very day that the letters were sent to the grand jurors, petitioner was before the district judge with relation to subpoenas served on associates of his

client, Ben Gold, and must have known that the continuing investigation related to matters such as communist affiliations, upon which his questionnaire bore. As an attorney, petitioner certainly should have been aware that this extraordinary questionnaire to the grand jurors (very different from the simple question of whether they were prejudiced against his client; the one question apparently authorized by the judge in the *Weinberg* case) bore too clearly upon the activities of the then functioning grand jury for him to be able to assume that such an approach to the grand jurors was justified without even informing the court of the fact that the questionnaire was being sent. At the very least, petitioner could properly be held to the duty of having to notify the court before attempting to contact the grand jurors.

The argument that the contact had to be made immediately because of the limitations of time upon a challenge to the grand jury (Pet. Br. 15) ignores the basic fact that petitioner should have known better than to contact a jury without permission. As the District Court noted (R. 25–26), had there been a suggestion of the need to investigate bias, and a showing of good faith in such investigation, the trial court "unquestionably would have postponed the time for filing motions until all indictments were filed and opportunity to ascertain the status of jurors had been afforded". The alleged necessity for prompt action does not excuse the failure to seek permission

from the court before approaching the grand jury, which was not only technically in session (as was apparently the situation in the *Weinberg* case) but which was actually deliberating on the type of case to which the questionnaire related.

There was nothing in the so-called "precedents" upon which petitioner allegedly relied to justify his assumption that he had the right to send the questionnaire at all. The grave questions as to the propriety of the questionnaire, however, need not be resolved in this case. Certainly, there was nothing in these alleged precedents to justify the sending of such a questionnaire to members of a grand jury, still actively considering the type of case to which the questionnaire related, without notification to and permission from the court of which the grand jury is the arm. Petitioner's conduct in so doing was clearly misbehavior by an attorney, who, as a lawyer, can properly be held to knowledge that such conduct was improper.

B. PETITIONER CANNOT AVOID LIABILITY ON THE GROUND THAT HE DID NOT INTEND "CONSCIOUS WRONG", SINCE HIS ACTIONS WERE KNOWING AND WILLFUL

Petitioner contends (Pet. Br. 17–20) that his conduct, even if "misbehavior", did not amount to contempt in that the element of intent is missing. He relies upon the following statement of the District Court (R. 26):

> While the Court finds there is no question as to the impropriety of what re-

> spondent has done, it is not without doubt, on the record before the Court, as to whether respondent's acts were committed in *conscious wrong*. There seems to be reason to believe respondent may have misconceived the proprieties. What he did was open. There was no opprobrious personal approach to jurors. There is indication respondent may have believed he had a right to propound the questions at the time he did, notwithstanding this Court is of opinion he had not. Under these circumstances, in the absence of a positive declaration by the Court, it may be unjust to severely punish respondent as otherwise would be required. Granting respondent all favorable inferences, his acts clearly disregarded the protection which must be vouchsafed jurors. The Court finds him guilty of contempt and imposes a fine of $100. [Emphasis added.]

It is evident throughout this statement that the District Court was of the opinion that petitioner knew what he was about when he canvassed the grand jurors. To say that he may not have intended "conscious wrong" is merely to say that he may not have entertained an evil motive or acted maliciously to harass the grand jurors. This may be a factor in mitigation but it does not establish lack of criminal intent.

While it is undoubtedly true that criminal intent is a material and essential element of the crime of criminal contempt and must be proved

beyond a reasonable doubt (*Ex parte Hudgings*, 249 U. S. 378; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418), it is equally well settled that the government need prove only that the contemnor acted knowingly and willfully. There is no need to prove, as in prosecutions for crimes involving a specific intent, that the contemnor acted with bad purpose or maliciously.

In the several cases that have discussed the element of intent in contempt cases the courts have rejected any need for showing an "evil intent", as distinguished from a "criminal intent". When the question arose in *Kelly* v. *United States*, 250 Fed. 947, 950 (C. A. 9), certiorari denied *sub nom. Galen* v. *United States*, 248 U. S. 585, in which Kelly, an attorney, had been charged with contempt for knowingly visiting and conversing with certain members of the petit jury with a view to influencing them, the court stated:

> The principal question in the case is whether the conduct of the plaintiffs in error, so shown by the evidence and found by the court, was such as to constitute contempt of court. *In order that one may be held for contempt for communications with jurors, on the ground of the harmful tendency thereof, it is not necessary to prove that the communications had or the acts done were accompanied with a wrongful intent.* It is sufficient if such acts and communications were knowingly and willfully done * * *, and had the tendency to influ-

> ence improperly the action of the jury. [Emphasis added.][4]

The refusal of the courts to require proof of a special criminal intent in contempt-of-court cases is buttressed by the decisions of the courts in contempt-of-Congress cases which have held that the statutory requirement that the contumacious act be done willfully means only that it was done knowingly and intentionally. In *Townsend* v. *United States*, 95 F. 2d 352, 358 (C. A. D. C.), certiorari denied, 303 U. S. 664, the court stated:

> It is only in very few criminal cases that "willful" means "done with a bad purpose." Generally, it means "no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law." *American Surety Co.* v. *Sullivan*, 2 Cir., 7 F. 2d 605, 606. In *United States* v. *Edwards*, 43 F. 67 * * * the court said: "'Willfully' means with design, with some degree of deliberation." In *Grand Trunk Ry. Co.* v. *United States*,

[4] See also Chief Justice Taney's statement in *Wartman* v. *Wartman*, 29 Fed Cases No. 17,210, at p. 306 (C. C. D. Md.): "As regards the question, whether a contempt has or has not been committed, it does not depend on the intention of the party, but upon the act he has done. It is a conclusion of law from the act." Cf. *Ellis* v. *United States*, 206 U. S. 246, 257, in which Mr. Justice Holmes stated: "If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent."

> 7 Cir., 229 F. 116, 119, the court said: "The word 'willfully,' as used in the act, has a number of times engaged the attention of the courts, and has quite uniformly been held not to require an evil intent, but only that the defendant should have purposely or intentionally failed to obey the statute, having knowledge of the facts."

The same view of "willful" in contempt cases was followed in *Barsky* v. *United States*, 167 F. 2d 241 (C. A. D. C.), certiorari denied, 334 U. S. 843, and *Fields* v. *United States*, 164 F. 2d 97 (C. A. D. C.), certiorari denied, 332 U. S. 851.

Petitioner insists that the District Court could not properly adjudge him guilty of contempt as long as it doubted "whether respondent's acts were committed in conscious wrong" (R. 26). This argument reads the words "in conscious wrong" out of context and divorced from their intended meaning. It rests upon a misconception of the intent required to be proved in criminal contempt cases. The true import of the court's words, gathered from the context, shows that it was considering evil motive, or its lack, in relation to penalty and not in connection with guilt.

Since petitioner knowingly and intentionally mailed the letters and questionnaires to the grand jurors, his insistence that he acted in good faith, believing that it was lawful and proper to canvass the grand jurors, cannot exonerate him. Whatever reasons induced him to believe he could, with

impunity, communicate with the grand jurors are immaterial, as it is well established that a mistake in law cannot excuse wrongdoing.[6] To the extent, however, that his *bona fides* precludes the existence of an evil intent or a purpose to flout authority, it may be considered a mitigating factor in assessing the punishment. The trial court, doubting that petitioner had acted "in conscious wrong", and concluding that it would "be unjust to severely punish respondent as otherwise would be required", imposed only a fine of one hundred dollars (R: 26).

C. SINCE PETITIONER WAS ACTING ON BEHALF OF AN INDICTED CLIENT FOR WHOM HE WAS COUNSEL OF RECORD, HIS "MISBEHAVIOR" WAS THAT OF AN "OFFICER OF THE COURT" ENGAGED IN AN "OFFICIAL TRANSACTION" WITHIN THE MEANING OF 18 U. S. C. 401 (2).

Neither the Court of Appeals nor the District Court encountered any difficulty in ruling that petitioner was an "officer of the court" within 18 U. S. C. 401 (2). Petitioner, in his answer to the show cause order, stated that he is a member of the bar of the State of New York, having been admitted to practice in that State in April 1933. He also recited that he had been retained as attorney for Ben Gold in connection with Gold's indictment in the District of Columbia and had, on August 31, 1953, filed an appearance *pro hac*

[6] The same argument, when advanced by a lawyer who had advised his clients that they could properly communicate with grand jurors, was completely rejected by the Sixth Circuit in *Schmidt* v. *United States*, 115 F. 2d 394, 396.

vice as attorney for Gold in the District Court for the District of Columbia (R. 8). Thus petitioner was an attorney of the District Court for the District of Columbia in his dealings with the grand jury empanelled by that court.

The guiding rule of the legal profession, that attorneys are officers of the courts before which they are permitted to practice, was clearly articulated in *Ex parte Garland*, 4 Wall. 333, 378, by Mr. Justice Field, who wrote:

> [Attorneys] are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. * * * The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded.[7]

This rule has been followed by all courts which have had occasion to consider the status of attorneys in relation to the courts. *Brooks* v. *Laws*,

---

[7] See also, *Ex parte Robinson*, 19 Wall. 505, 512; *Ex parte Bradley*, 7 Wall. 364, 374; and *Tanner* v. *United States*, 62 F. 2d 601 (C. A. 10), certiorari denied, 289 U. S. 746, all of which involved contempt situations.

208 F. 2d 18 (C. A. D. C.); *Spilker v. Hankin*, 188 F. 2d 35 (C. A. D. C.); *Booth v. Fletcher*, 101 F. 2d 676 (C. A. D. C.), certiorari denied, 307 U. S. 628; *Bowles v. United States*, 50 F. 2d 848 (C. A. 4), certiorari denied, 284 U. S. 648; *Bartos v. U. S. District Court for the District of Nebraska*, 19 F. 2d 722 (C. A. 8); *Hertz v. United States*, 18 F. 2d 52 (C. A. 8); *In re Alexander*, 193 Fed. 749 (N. D. Ohio); *In re Wall*, 13 Fed. 814 (C. C. S. D. Fla.), affirmed, 107 U. S. 265.

That petitioner, as an officer of the court, was engaged in an official transaction within the meaning of 18 U. S. C. 401 (2) when he submitted the questionnaires and covering letters to the grand jurors seems apparent from the facts. The letters and questionnaires reveal on their face that petitioner, in causing them to be mailed in New York City and delivered in the District of Columbia, was acting in an official transaction, and using his official position as an attorney of the court in an attempt to obtain answers from the grand jury. The letters, prepared on petitioner's letterhead, stated that they refer to "U. S. v. Gold, U. S. District Court for the District of Columbia, Criminal No. 1344-53" (R. 3), a case within the jurisdiction of the court which exercised supervision over the addressees as grand jurors. The opening sentence, that the author of the letter is "counsel for the defendant, Mr. Ben Gold, in the above-entitled proceeding"

(R. 3), imports that the author was writing in his professional capacity as attorney in connection with the specific case. The official nature of this correspondence is highlighted by the petitioner's statement that he was writing the addressee "and all of the other Federal government employees who sat on the Grand Jury which indicted Mr. Gold" (R. 3). These letters, addressed to persons who were formally sworn and were officially members of a grand jury, concerning a person accused of a crime by an indictment returned by the addressee grand jurors, and prepared by an attorney who purported to act for the accused, bear all the indicia of correspondence in an official transaction.

Also bearing on the issue of whether petitioner acted in an official transaction when he caused these letters to be mailed is his statement to each addressee that it was his "duty as a citizen to help enlighten the court on an issue which affects the liberty of a citizen on trial in a criminal case" (R. 4). By undertaking to instruct the grand jurors as to their duty in respect to the court, petitioner appears to clothe himself with more than private authority. He inferred, not too obliquely, that he was acting in the interests of the court as well as his client.

Because the grand jury is an official arm of the court, petitioner, by communicating with its members relative to a case within their official cognizance, and within the jurisdiction of the

court, was engaged in an official transaction. Mr. Justice Harlan, writing the opinion in *Savin, Petitioner*, 131 U. S. 267, 277, cited with approval the holding in *Heard* v. *Pierce*, 8 Cush. (Mass.) 338, 341, that "the grand jury, like the petit jury, is an appendage of the court".* Following the *Savin* decision, Mr. Justice Cardozo recognized the official status of grand jurors in the judicial structure, stating in *Clark* v. *United States*, 289 U. S. 1, 11, 12, that "[a] talesman, when accepted as a juror becomes a part or member of the court" and that, "[a] talesman, sworn as a juror, becomes, like an attorney, an officer of the court."

Thus, in the instant case, the letters and questionnaires were not only prepared by petitioner as an officer of the court but were directed to other officers of the same court. They concerned a case within the jurisdiction of the court and were to be used to attack the indictment returned by the grand juror addressees against petitioner's client. Such letters, prepared and mailed by an officer of the court, directed to other officers of the court, concerning a case officially before the court, were part of petitioner's official transactions involving the court. The fact that the official transaction may also have consti-

---

*Cited with approval in *United States* v. *Dachis*, 36 F. 2d 601, 602 (S. D. N. Y.); *Camarota* v. *United States*, 111 F. 2d 243, 246 (C. A. 3). See also *United States* v. *Smyth*, 104 F. Supp. 283, 291 (N. D. Cal.).

tuted professional misconduct does not make it any the less a contempt of court under 18 U. S. C. 401 (2).

Though the phrase "in their official transactions", as used in Section 401 (2), first appeared in the federal contempt statute in 1831,[9] no case has been discovered which defines it in a situation similar to the one here involved. That the phrase does encompass the act of petitioner as an attorney in contacting members of the active grand jury which indicted his client in relation to the indictment of his client is evident from the language of the courts which have passed on other types of misconduct by attorneys under this statute. In *In re Paschal*, 10 Wall. 483, this Court considered motions filed by the State of Texas in this Court for an order to compel George W. Paschal, an attorney and counsellor of this Court, who had represented the State in two cases before the Court, to pay to the clerk for the benefit of the State money allegedly received by him under a

[9] Section 1 of the Act of March 2, 1831, 4 Stat. 487, limited the power of the United States courts to inflict summary punishment to the same three types of offenses as now appear in 18 U. S. C. 401. There were no Congressional debates preceding the Act of March 2, 1831, which throw light on the meaning of its phrases, other than the remarks of Mr. Draper of Virginia, 7 Cong. Deb. 560, which reveal that this Act's purpose was to narrow the broad contempt powers conferred on United States courts by Section 17 of the Judiciary Act of 1789, 1 Stat. 73, 83, and to deny them the power to punish by contempt hostile and unfavorable criticism in the press.

decree in one of the cases before the Court. Mr. Justice Bradley, writing the opinion, stated, at page 491, that:

> The application made on the first of these cases (No. 4), for an order on the respondent to pay money into court is in the nature of a proceeding as for a contempt. The application is based upon the power which the court has over its own officers to prevent them from, or punish them for, committing acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice. For such improper conduct the court may entertain summary proceedings by attachment against any of its officers, and may, in its discretion, punish them by fine or imprisonment, or discharge them from the functions of their offices, or require them to perform their professional or official duty under pain of discharge or imprisonment. The ground of the jurisdiction thus exercised is the alleged misconduct of the officer. If an attorney have collected money for his client, it is *prima facie* his duty, after deducting his own costs and disbursements, to pay it over to such client; and his refusal to do this, without some good excuse, is gross misconduct and dishonesty on his part, calculated to bring discredit on the court and on the administration of justice. It is this misconduct on which the court seizes as a ground of jurisdiction to

> compel him to pay the money, in conformity with his professional duty.

In a comprehensive review of the law of contempt and its administration under the federal statute, the court in *United States* v. *Anonymous*, 21 Fed. 761, 771 (C. C. W. D. Penn.) cited the *Paschal* decision as authority for its statement:

> Attorneys are officers of the court, and are, like parties, witnesses, jurors, and the officials, entitled to protection, and are subject especially to the power of the court to compel them to behave themselves with propriety in such matters as pertain to the business of the court in all its ramifications.

This is a prosecution under 18 U. S. C. 401 (2) punishing misbehavior of an officer of the court in an official transaction. For this reason, considerations as to what constituted contempt "so near the court" as to obstruct the administration of justice are inapposite. Subsection (2), governing only the court's "officers in their official transactions", forbids "misbehavior" regardless of its geographical location and regardless of whether it results in an obstruction of justice. It is a vindication of the court's essential right to insist that its officers in their official transactions behave with propriety at all times and in all places.

Thus, the ruling in *Nye* v. *United States* 313 U. S. 33, overruling *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, that conduct which did tend to obstruct the administration of jus-

tice, however reprehensible, was not contempt within subsection (1)[10] unless in the geographical presence of the court, has no bearing on this case where punishment was imposed under subsection (2) of 18 U. S. C. 401. Similarly, *In re Michael*, 326 U. S. 224, in which false and evasive testimony before a grand jury by a court appointed trustee was held not to constitute contempt is inapplicable to the instant case. While the witness in that case had been a trustee of the court, in his appearance before the grand jury he was not acting in his official capacity as a then officer of the court in a pending case, and the attempt to punish him for contempt was under subsection (1).

The two *Schmidt* decisions relied upon by petitioner (*Schmidt* v. *United States*, 115 F. 2d 394 (C. A. 6) and *Schmidt* v. *United States*, 124 F. 2d 177 (C. A. 6) (see Pet. Br. 22–23)) are also distinguishable. Schmidt, an attorney, had advised his clients who had been indicted that they could lawfully interrogate the grand jurors concerning the evidence upon which the indictments were found. The clients, following Schmidt's advice, contacted several of the grand jurors and obtained from them affidavits which Schmidt filed in the court in conjunction with motions to quash

[10] Subsection (1) of 18 U. S. C. 401 extends the federal contempt power to "[m]isbehavior of any person in [the court's] presence or so near thereto as to obstruct the administration of justice."

the indictments. The court, on petition of the government, ordered Schmidt to show cause why he should not be adjudged in contempt "for filing these affidavits contrary to and in violation of the oath of said grand jurors, without application to or permission from the court, at a time when the grand jurors were subject to recall and before they were finally discharged". The court, in ruling that procuring and filing the affidavits under the circumstances was contempt because it constituted an obstruction of justice, based its decision on the forerunner of subsection (1) of section 401.

On the first appeal, the Court of Appeals said that Schmidt's advice which caused the "clients or the jurors themselves to disregard or ignore the oath [of secrecy] was, per se, an unlawful interference with the proceedings of the court, and, however honestly given, was at least a technical contempt." However, it reversed the conviction on the sole ground that the matter should not have been tried before a judge who was confronted by Schmidt's affidavits of bias and prejudice. On the second appeal, taken by Schmidt following his second conviction for contempt, the court ruled that the act of filing the grand jurors' affidavits was not misbehavior "in the presence of the court or so near thereto as to obstruct the administration of justice". It went on to say that Schmidt could not be held in contempt for misbehavior as an officer of the court in an official

transaction since he had not been so charged in the order to show cause. The second decision thus holds no more than that an attorney cannot be held guilty of contempt under subsection (2) when he has been charged with violating subsection (1).

Moreover, there was not present in the *Schmidt* case the element present here of an attempt to give the approach to the jurors the dignity of an official transaction. As discussed above, one of the factors which makes the conduct here misbehavior "in an official transaction" is that petitioner himself made it such; that it was written in petitioner's capacity as "counsel for the defendant," *i. e.*, as an officer of the court, calling upon the jurors as a matter of "duty", to help "enlighten the court on an issue which affects the liberty of a citizen on trial in a criminal case" (R. 4).

This is one factor to which Judge Fahy failed to give sufficient weight in his dissent below. Judge Fahy assumed that petitioner was an officer of the court and was guilty of misbehavior within the meaning of 18 U. S. C. 401 (2). The only problem for him was whether the conduct of petitioner was "that of an officer of the court in an official transaction" (R. 39). He succinctly stated his view (R. 40) that—

> * * * when he [petitioner] communicated by mail with grand jurors to obtain information in preparing his client's case he

> was not engaging in an official transaction as an officer of the court. In other words, I do not think Congress intended by § 401 (2) to grant courts the power by summary proceedings to police such professional behavior of a member of the bar.

Neither the application of the government for an order to issue to petitioner to show cause why he should not be adjudged in contempt (R. 1–6), nor the order of the court directing petitioner to show cause (R. 6–7), nor the order and opinion of the court adjudging petitioner in contempt (R. 24–26), reveal an understanding that this prosecution under 18 U. S. C. 401 (2) was to constitute mere disciplinary action. When an attorney, as counsel and in his capacity as an officer of the court, approaches the grand jury arm of the court in terms which speak of the "duty" of the grand jury to "enlighten" the court, he is doing more than merely acting as an attorney in a private transaction. He is using his official position as an officer of the court to give his request the formality and authority that inhere in the judicial process. That is the kind of conduct by an attorney which is an official transaction affecting the court. Since such conduct constitutes misbehavior (see *supra*, pp. 16–26), it is misbehavior by an officer of the court in an official transaction within the terms of 18 U. S. C. 401 (2).

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
GRAY THORP,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
RICHARD J. BLANCHARD,
Attorneys.

JANUARY 1956.

U. S. GOVERNMENT PRINTING OFFICE 1956